No. 14628

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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NICK ALLEN KLUBNIKIN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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Appeal from the United States District Court for the Southern District of California, Central Division, The Honorable James M. Carter, Presiding.

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## APPELLANT'S OPENING BRIEF.

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### Jurisdictional Statement.

Appellant was convicted and sentenced to four years imprisonment by the above entitled District Court, on December 13, 1954, for violation of the Universal Military Training and Service Act (50 Appx. U. S. C. A., Sec. 456(j)), in that he failed to report for civilian employment as directed by the Selective Service Director. A notice of appeal was filed by appellant on the day of his judgment of conviction.

Jurisdiction of this cause is invoked by Section 1291 of Title 28, Federal Judiciary Code, and Rule 37 of the Federal Rules of Criminal Procedure.

## Preliminary Statement of Fact.

Appellant, who at the time of conviction, was twenty-three years of age,[1] was born and raised in the religious faith of the Molokan Holy Spiritual Jumpers, commonly referred to as the *Molokans*. This religious sect has historically and traditionally opposed war and military service in any form, although it has endured hardship, persecution and even exile (from Russia) by its adherence to this belief.[2]

In February, 1951, appellant received a 1-A classification from his local draft board[3] which he appealed administratively on religious grounds.[4] As a result, his classification was ultimately modified by the Appeal Board, and he was granted status as a 1-A-O (non-combatant military service).[5] Further efforts to appeal the latter classification were unsuccessful, and when finally ordered to report for military duty, appellant refused.[6] Consequently, appellant was indicted and tried in the District Court for the Southern District of California for failure to report for induction, but appellant was acquitted upon the ground that the classification (1-A-O) had no basis

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[1]See: Selective Service File, page 2 (hereinafter referred to as SSF-[page number]).

[2]Thomas: *The Conscientious Objector in America,* pp. 50-54, 149-155, 189-191.

[3]SSF-11

[4]SSF-11, 19.

[5]SSF-56.

[6]SSF-11.

in fact.[7] Thereafter, on November 18, 1953, appellant was reclassified 1-O, which classification has not since been altered or modified.[8]

On June 7, 1954, following his reclassification to 1-O, appellant was ordered to report to the Draft Board on June 21, 1954, for assignment to the Los Angeles County Department of Charities as an institutional helper in lieu of induction.[9]

In the meanwhile, other events running parallel to the above mentioned incidents combined to affect appellant's draft status in other respects.

In December, 1952, appellant's father died, and appellant assumed the responsibility for his mother's support.[10] Later, shortly after his acquittal in November, 1953, appellant married, and learned several months later that his wife had become pregnant.[11]

Accordingly, on April 14, 1954, appellant notified his local draft board of these facts, and requested a III-A classification (dependency deferment).[12] The Board refused to reopen the case or reclassify appellant,[13] whereupon, on June 15, 1954, he addressed a communication "to

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[7]*United States v. Klubnikin,* No. 22956-CD (decided Nov. 4, 1953). See, also: Transcript of Record (hereinafter referred to as TR) at p. 17.

[8]SSF-11.

[9]SSF-108.

[10]SSF-118.

[11]SSF-118. Appellant has been a father since November, 1954.

[12]SSF-99. See p. 13, *infra.*

[13]SSF-101.

the members of Local Board No. 114," which reads in pertinent part:

> "Dear Sirs:
>
> I am appealing to you members of Local Board No. 114 in request for a cancellation of the report for civilian work . . .,"[14]

assigning the aforementioned facts relating to his family status in support of his appeal. The Board replied the following day, however, as follows:

> "Dear Sir:
>
> This will acknowledge receipt of your request for a dependency deferment. The information has been reviewed by this Local Board and it is of the opinion that the facts presented do not warrant the reopening or reclassification of your case at this time . . ."[15]

Pursuant to its above-mentioned Order of June 7, 1954, appellant appeared at the Local Board on June 21, but refused to accept his assignment.[16]

The instant proceedings, culminating in his conviction, were the outgrowth of that refusal.

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[14]SSF-117.

[15]SSF-119.

[16]SSF-120, 122.

## Issues Involved.

I.

Was appellant afforded an opportunity to appeal the Local Board's refusal to reopen his classification; and if not, did this constitute a denial of due process of law?

II.

Did the failure of the Local Board to treat the appellant's request for change of classification result in a deprivation to him of due process of law?

III.

Is Section 1622.30 of the Selective Service Regulations unconstitutional as an unreasonable classification?

IV.

Is the decision of the Local Board refusing to reopen and reclassify without basis in fact?

V.

Is the order of the Local Board assigning appellant to a local civilian employment invalid as an unlawful exercise of authority?

VI.

If the Answer to Point V is in the negative, then is the authority upon which the order rests constitutional?

## ARGUMENT.

### I.

### The Local Board's Refusal to Reclassify Appellant Constituted a Denial of Due Process of Law in That He Was Not Afforded an Opportunity to Appeal the Board's Decision.

It is the contention of appellant, first, that the Selective Service Regulations make no provision for appeal from a refusal of a Local Board to reopen a classification, and hence, deprive appellant of an essential element of due process.

As indicated previously, shortly prior to April 14, 1954, appellant learned of his wife's pregnancy. At that time, he was also supporting his mother (whose hearing was apparently impaired).[17] Therefore, he applied on that date for his draft board for reclassification to III-A.[18] A day or so later, the Board wrote back its decision not to reopen his draft status.

No classification is permanent (Selective Service Regulations, Sec. 1625.1(a)).[19] Moreover, a registrant is entitled to the lowest classification for which he is eligible (Regulations, Sec. 1623.3).

Nevertheless, the appellant was unable to appeal from the Local Board's refusal to reclassify him.

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[17]SSF-117, 118.

[18]SSF-99.

[19]Title 32, Code of Federal Regulations. Hereafter, for brevity and convenience, reference will be made simply to the Regulations.

Section 1625 of the Regulations is devoted to the subject of reopening classifications. Thus, Section 1625.13, relating to appeals, states:

> "Each *such* classification shall be followed by the same right of appearance before the Local Board and the same right of appeal as in the case of an original classification." (Italics ours.)

In the context of the section as a whole, however, it is obvious that the quoted portion refers only to "such classification(s)" as are reopened, and not those where the Board has declined to reopen and reconsider.[20]

As a matter of fact, this view is clinched by the subtitle to that section, which reads:

> "Right of Appeal Following Reopening of Classification."

The only other regulation form providing for an administrative review procedure is Section 1624.2(e),[21] the relevant part of which says:

> "Each *such* classification or determination not to reopen the classification made under *this* section shall

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[20]The two sub-sections immediately preceding sub-section 1625.13, for example, spell out the procedure following the reopening of classifications. Once a classification has been reopened, the registrant must be classified even though he receives the same classification; and he is entitled to notice and right of appearance as if it were an original classification. (Section 1625.12.) Strictly speaking, there is neither a classification nor a re-classification upon the board's refusal to reopen. Thus, the term "such classification" in subsection 1625.13 can only pertain to actual classification procedure.

[21]A third appellate procedure is offered by Section 1626.1 *et seq.* of the Regulations. But the procedure is restricted to appeals from classification, and can be utilized only when a Notice of Classification is sent to the registrant. Since appellant was not classified at this point, this section is patently inapplicable.

be followed by the same right of appeal as in the case of an original classification." (Italics ours.)

But this section is wholly unrelated to the regulations previously discussed, or to the issues in this case. The phrase "this section" as used in Section 1624.2(e) refers to the procedure available following a personal appearance before the Local Board. Under Section 1624.2(b), a registrant may appear before the Board to present additional information relevant to his status. He is entitled to a personal appearance, however, only within ten days after the Local Board has mailed him a Notice of Classification (Regulations, Sec. 1624.1(a)).[22] If, following the registrant's personal appearance, the Board determines not to reopen his classification, then Section 1624.2(e) comes into operation. The phrase "such classification or determination" takes on this special context.

Now, it is significant that a form No. 110 (Notice of Classification) was last sent to appellant by the Board on November 18, 1953.[23] This was prior to the accumulation of events which gave rise to his request for a III-A status. But of equal importance is the fact that, at all times herein, only the Form 110 advised a registrant of his right to appear personally before the Board or otherwise explained appeal procedures.

Therefore, in April, 1954, when appellant first applied for a dependency exemption, he was unable to process an appeal from the Local Board's refusal to reopen his classification. Furthermore, he could not request a personal appearance from which a determination not to reopen

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[22]This notice is designated by the Regulations as SS form 110.

[23]According to the minutes of his Local Draft Board (SSF-11 A).

might be appealed because the factors comprising his claim to III-A status occurred far beyond the ten day limitation period following his receipt of the Notice of Classification.[24]

Finally, unlike other registrants who receive an adverse classification upon a form which advises them of their right to appeal, appellant was simply notified of the Board's decision by a letter containing no such information.

Thus, appellant was not apprised of his right to appear before the Local Board in support of his claim (See: *United States v. Giessel* (D. C. N. J.), 129 Fed. Supp. 223; *United States v. Derstine* (E. D. Penna.), 129 Fed. Supp. 117; *United States v. Vincelli* (C. C. A. 2), 215 F. 2d 210, reh den. 216 F. 2d 681; *Herrett v. United States* (C. C. A. 9), 216 F. 2d 659). He was unable to process an appeal from the Board's refusal to reopen his classification (*United States v. Derstine* (E. D. Penna.), 129 Fed. Supp. 117; *Compare: Cox v. Wedemeyer* (C. C. A. 9), 192 F. 2d 920, 923). And he could not request a personal appearance, which, if allowed, would have created a right to appeal from the Board's refusal to reopen (Regulations, Sec. 1624.2. *Compare: United States v. Vincelli, supra*).

The effect of the Selective Service Regulations upon appellant is clear. For all practical purposes, appellant's classification is permanent, notwithstanding Section 1623.3 and 1625.1(a) of the Regulations. Though manifestly entitled to at least a hearing, if not to a reclassification, appellant nonetheless has no procedural means by which to

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[24]See: Section 1624.1(a) Regulations.

secure a review of the Board's refusal to reopen his classification. If the Board's classification is arbitrary or capricious, it may yet stand because no appellant authority is willing or able to pass upon it. On the other hand, other registrants whose dependency status is no different than appellant's are at least afforded the opportunity of administrative review where the local board has in fact reopened, or where the registrant has received his Notice of Classification, or has been allowed to appear personally in support of his claim.

In *Dickinson v. United States,* 346 U. S. 389, the Supreme Court set aside the classification of a local board which was contradicted by unrefuted evidence, and had no basis in fact (see also: *Cox v. Wedemeyer,* 192 F. 2d 920, where the petitioner had "deserted" the army in time of war). Here, however, the Board does not simply refuse to reclassify appellant, but indeed, declines to even entertain the claim.

> "A registrant who fails to have a fair chance for his proper classification on his appearance before the local board has been denied due process of law." (*Franks v. United States* (C. C. A. 9), 216 F. 2d 266, 270.)

If it is true that a registrant is entitled to the lowest classification for which he is eligible (Regulations, Sec. 1623.2), then correlatively, the Board has a continuing duty to consider a claim for deferment on its merits, at least where it is not patently frivolous. In *United States v. Vincelli,* 215 F. 2d 210, the second circuit held that a draft board *must* reopen a classification in order to make:

> "An inquiry designed to test the asserted facts sufficiently to give the Board a rational base on which to put its decision." (At p. 213.)

Moreover,

> ". . . if a change of status was disclosed, it was the duty of the Board to take it into consideration and to *classify* him in the light of the new evidence presented." (*Brown v. United States* (C. C. A. 9), 216 F. 2d 258, 260.)

Appellant has a right to be heard on facts affecting his draft status which arise subsequent to his classification (*Brown v. United States* (C. C. A. 9), 216 F. 2d 258, 260; *Knox v. United States* (C. C. A. 9), 200 F. 2d 398); and the Local Draft Board has the obligation to consider this new information (*Davis v. United States* (C. C. A. 6), 199 F. 2d 689; *Cox v. Wedemeyer* (C. C. A. 9), 192 F. 2d 920).

## II.

## The Local Board's Failure to Treat Appellant's Second Request for Change of Classification as an Appeal Was a Denial of Due Process of Law.

In order to foreclose any argument regarding appellant's alleged failure to exhaust his administrative remedies, and simultaneously, to point up the arbitrary and capricious position of the Local Board respecting appellant's dependency claim, we next consider what steps the appellant did take to have that claim reviewed.

Appellant's letter of April 14, 1954, contained the following pertinent language:[25]

> "Dear Sirs:
>
> . . . there have come about certain events under which I am appealing for a 3-A classification. This

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[25]SSF-99.

new evidence has arisen since the time of my last classification . . .

* * * * * * * *

Awaiting your decision on my appeal for a 3-A classification.

Respectively *(sic)* yours,
Nick Allen Klubnikin, Jr."

This request was peremptorily denied by the Draft Board the following day.[26] Thereafter, appellant addressed his letter of June 15, 1954, as follows:[27]

"To the members of Local Board No. 114:"

and wrote in pertinent part as follows:

"Dear Sirs:

I am appealing to you members of Local Board No. 114 in request for a cancellation of the report for civilian work *(sic)* . . ."

The balance of the letter elaborates upon the reasons for his request for III-A classification (the nature of which has been discussed heretofore). Nonetheless, the Local Board treated this letter merely as a second application for dependency deferment rather than as an appeal.

The Regulations expressly provide for liberal construction "of any such notice" so as to permit appeal. Indeed, Section 1626.11 of the Regulations states:

"Such notice (of appeal) need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal."

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[26]SSF-101.

[27]SSF-116-118.

It thus appears that the only condition for perfecting appeal (aside from time limitations) is identification of the appellant and of the registrant, both of which requirements were met here.[28]

> "Registrants are not thus to be treated as though they were engaged in formal litigation, assisted by counsel."
>
> *United States v. Craig* (C. C. A. 3), 207 F. 2d 888, 891.

*Accord:*

*United States v. Derstine,* 129 Fed. Supp. 117.

But of equal, if not greater significance, is the fact that historically the Local Board treated other similar communications of appellant as appeals. For example, on February 7, 1951, the Board received the following letter from appellant:[29]

"February 15, 1951

"Gentlemen:

In reply to your letter of February 15, 1951, which placed me in a 1A class, I am reminding you again of my Religious Objection to participation in war (*sic*) in any form. I can't understand your decision in arriving at a 1A classification, since I have informed you fully of my religious convictions.

I am reminding you once again of my stand, and I claim a 4E classification based on my religious training. Thank you.

Sincerely yours,

NICK ALLEN KLUBNIKIN."

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[28]In both letters, for example, the appellant's signature is plainly written, and the use of the first person singular indicates that the author is also the registrant.

[29]SSF-19.

Despite the absence of a request that the letter be considered an appeal; despite the absence of even the term "appeal," the Board treated the letter as just that.[30]

Again, on August 14, 1952, appellant wrote his Draft Board another letter, which read, in part:[31]

"Letter of Appeal
August 14, 1952

To the Members of Local Board 114:

In reference to the . . . (1-A-O) classification you have given me . . . I am appealing for a religious conscientious objectors classification . . .

* * * * * * * *

I again appeal for a classification of a religious conscientious objector.

Sincerely,
NICK ALLEN KLUBNIKIN."

This communication, which bears a striking resemblance to appellant's letter of June 15, 1954, was also regarded by the Board as an appeal,[32] and was so designated in its minutes.[32a] Hence, the Government is hardly in a position to now argue that appellant failed to exhaust his administrative remedies. Appellant went as far as he could go; the captious and unreasonable conduct of the Local Board precluded further recourse.

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[30]SSF-11.
[31]SSF-57.
[32]SSF-11.
[32a]SSF-11A.

## III.

## Section 1622.30 of the Selective Service Regulations Is Invalid as an Unreasonable Classification, and the Draft Board's Refusal to Entertain Appellant's Dependency Claim Constituted a Denial of Due Process of Law.

Sections 1622.30 (a) and (b) are the dependency deferment sections, and are set out more fully in Appendix "A." In substance, paragraph (a) of this section exempts only those registrants who prove fatherhood, prior to August 25, 1953. This provision, then, has two effects: First, a registrant with one child born prior to August 25, 1953 is deferred, while a father who may have three or four children after that date must still serve unless he can otherwise establish hardship. This seems to have no rational basis, and it is submitted that if the Local Board rested upon this Regulation in refusing to reopen appellant's classification, its decision was arbitrary and capricious, and without basis in fact.

Additionally, the date line not only unreasonably and arbitrarily discriminates among fathers, but is an immoral classification in that it

> ". . . invades the most sacred precinct of family life at a time when there should be the most complete mutuality between the spouses and in face of nature's most demanding and significant urge in nature's scheme for propagating the species. . . ."
>
> *Talcott v. Reed* (C. C. A. 9), 217 F. 2d 360, 363.

While the issue advanced here has not been passed upon by any court so far as is known to appellant, at least

three cases have involved administrative directives affecting family life. In the *Talcott* case, just quoted, a Regulation provided that a change in status would not produce a change in classification (under certain conditions not important here) unless such newly acquired status resulted from "circumstances over which the registrant had no control." (Regulations, Sec. 1625.2.) Bulletin No. 57 was issued by the Director of Selective Service, providing that

> ". . . Pregnancy is a status over which the registrant does have control, and it is therefore not a claim which can be classified under 'hardship' . . . beyond the registrant's control."

This court held that Bulletin "morally and legally wrong" for the reasons just quoted. (*Talcott v. Reed, supra.*)

Similarly, in *United States ex rel. Barriel v. Clement,* 101 Fed. Supp. 349, a District Court struck down a resolution of a Local Board which had "the effect that registrants who married after July 7, 1950, would not be considered for deferment except in extreme hardship cases."[33] Compare with *Mintz v. Howlitt,* 207 F. 2d 758 at 760, where the Second Circuit commented:

> "But we find nothing in the Selective Service Regulations which in any way justifies a local board in inquiring into the nature of a pregnancy to determine whether it is 'an effort to escape induction' or is otherwise to be frowned upon. Such an inquiry would surely be weird, if not against public policy, and seems clearly against the spirit of the Regulations."

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[33]The Court found, however, that the resolution was in conflict with the Regulations.

It is respectfully submitted, therefore, that a construction of Selective Service Regulation, Section 1622.30(a) by the Local Board which differentiates appellant from fathers with children born prior to August 25, 1953; and which tends to corrupt appellant's family relationship, is an unreasonable classification, and a denial of due process of law, and in fact, clearly exceeds the intent of Congress to let the burdens of Selective Service fall equally and fairly upon all.

## IV.

## The Refusal of the Local Board to Reclassify Appellant Was Without Basis in Fact.

Appellant was at no time afforded the opportunity to appear personally upon the merits of his claim, or to offer additional evidence to substantiate his request for reclassification. But the record is barren of the grounds for this refusal, and the evidence of hardship to appellant has at no time been refuted or contradicted. Thus, the Board has no rational basis upon which to rest its decision. (See: *United States v. Vincelli* (C. C. A. 2), 215 F. 2d 210, reh. den., 216 F. 2d 681.)

However, the District Court below seemed to question the sincerity of the dependency claim in view of the recency of its presentation. [TR 25-26, 44.) It is conceivable that this is the motive for the Board's refusal to reopen as well.

What the Court may have overlooked, however, was the relative recency of the events which combined to render appellant eligible for the III-A classification. His mother became a widow in December, 1952, and thereafter he assumed responsibility for her care. But in November, 1953, appellant acquired an additional (albeit pleas-

ant) obligation of a wife, and in March or April of 1954, he first learned of his wife's pregnancy.

It was the *combined* presence of these factors which compelled appellant to seek reclassification. In any event, there is no evidence to suggest that the claim was advanced in bad faith, or was other than the coincidence in point of time. A similar coincidence was present in *Dickinson v. United States,* 346 U. S. 389, and in *Brown v. United States* (C. C. A. 9), 216 F. 2d 258, but both Courts held that suspicion cannot support a draft classification. (See also: *Schuman v. United States* (C. C. A. 9), 208 F. 2d 801, 804.)

Besides, if in fact the appellant is eligible for III-A classification, his motive for seeking it is immaterial. It is presumed that one claiming an exemption or deferment is seeking to avoid military service, albeit lawfully. In fact, this is the purpose of the exemption provisions.

Furthermore, a belated application for a new classification, notwithstanding the misgivings it may invite, has usually been awarded the same consideration by the Courts as any otherwise meritorious claim. (*Dickinson v. United States, supra; Brown v. United States,* 216 F. 2d 258; *Schuman v. United States* (C. C. A. 9), 208 F. 2d 801; compare: *United States v. Geissel,* 129 Fed. Supp. 223.) In the *Dickinson* and *Brown* cases, the registrants were elevated to ministerial status while induction hovered over them. In *Schuman,* the registrant originally gave his occupation as a student, but just two months prior to his notice of induction, he notified the Board of his affiliation

with the Jehovah Witnesses sect, and claimed ministerial and conscientious objector status. The Court answered the argument of untimely claim at page 805:

> "When the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of his claim solely on the basis of suspicion and speculation is both contrary to the spirit of the act and foreign to our concepts of justice."

Again, in *Giessel,* time for appeal had expired, but the Court refused to convict where the administrative proceedings lacked due process of law.

In sum, the Local Board's refusal to at least reopen appellant's classification is a decision without rational basis in fact. Under Section 1622.30(b) of the Selective Service Regulations, appellant presented a *prima facie* case of extreme hardship which would inure to his mother, wife and child as a result of his induction. The Board did not permit appellant the simple right of a personal appearance, nor did it trouble itself to even inquire further into appellant's new status. Moreover, the Board's hasty disposition of appellant's request raises an inference that the matter was not even carefully considered by the Board.

> "The test of whether a draft board's action may be attacked is whether it receives and considers what a particular registrant submits."
>
> *Davis v. United States* (C. C. A. 6), 199 F. 2d 689.

Under the foregoing circumstances, it is respectfully submitted that the order of the Local Board denying appellant the reopening of his case, and reclassification is void for want of due process of law.

## V.

## The Order of the Local Board Assigning Appellant to Local Civilian Employment Was an Unlawful Exercise of Authority.

### A. The Employment to Which Conscientious Objectors Are Assigned Must Fall Within Federal Jurisdiction.

In a word, appellant was assigned by the Local Draft Board to perform civilian work, in lieu of military service, in the Los Angeles County Department of Charities, an agency of the Los Angeles County government. For refusing to do this work, appellant was indicted, prosecuted and found guilty.

The purported authority for this order rests on Section 456(j) of the Universal Military Training and Service Act, which provides, in part:

> "if he is found to be conscientiously opposed to participation in (combat or) non-combatant service, in lieu of such induction, (he shall) be ordered by his local board, subject to such regulations as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety or interest as the local board may deem appropriate . . ."

Section 1660.1 of the Regulations defines "appropriate civilian work" *as limited to:*

> "(1) Employment by the United States Government or by a State, territory, or possession of the United States, or by a political subdivision thereof . . .
>
> "(2) Employment by a non-profit organization, association or corporation which is primarily engaged

> either in charitable activity conducted for the benefit of the general public . . ." (Italics supplied.)

Congress, however, provided expressly that the work to be performed by conscientious objectors was to contribute to the *national* health, safety and interest. Yet, here we find a local board directing appellant to civilian employment within a wholly local establishment.

Now the word "national" as used in Section 456(j) has very clear and meaningful connotations. Black's Law Dictionary, 3rd ed., describes the term as:

> "pertaining or relating to a nation as a whole; commonly applied in American Law to institutions, laws, or affairs of the United States or its government, as opposed to those of the several states." (P. 1221.)

Moreover, the term has distinctive uses and application such as, "national parks" as distinguished from "state parks"; "national" and "state" labor relations boards; "national" banks and "state" banks; etc. (See: *Words and Phrases,* Vol. 28, pp. 2125.) Additionally, it is a crime for a business or a firm to use the word "national" in its name except as permitted by law (18 U. S. C. A., Sec. 709). In *Byers v. United States* (C. C. A. 10), 175 F. 2d 654, cert. den. 338 U. S. 887, it was held that courts may take judicial notice of the fact that a bank with the word "national" in its title is one organized under the laws of the United States.

**B. The Board's Assignment of Appellant to Employment With the Los Angeles County Department of Charities Was Arbitrary and Capricious.**

Aside from failing to meet the standard of work set up by Congress, the assignment itself was arbitrary. The Local Board failed to consider, and by virtue of the Regulations, it could not consider, whether in fact appellant's pre-induction employment contributed to the national health, safety and interest.

As a matter of fact, the Selective Service Regulations treat conscientious objection as a punishment rather than as a way of life to be fitted within the American concepts of fair play and religious freedom. For example, Section 1660.21 prohibits the performance of civilian work in the community where registrant resides. Apparently it is felt that if a soldier must surrender his home to join the army, so must a conscientious objector. Nonetheless, Congress has recognized conscientious objection as a valid religious concept. In providing for civilian employment, Congress probably reasoned that the conscientious objector could furnish the source of labor which could be used to fill the gaps with a large standing army necessarily left. It is unnecessary to suspicion that Congress intended to withdraw the recognition it gives to the conscientious objector by imposing upon them a different form of military, or semi-military duty.

A serious question is raised as to the validity of regulations which deliberately and arbitrarily preclude appellant from his current occupation at least without a showing that such work does not contribute to the national health, safety and interest.

## VI.

## Section 456(j) of the Universal Military Training and Service Act Is Unconstitutional in That It Violates the First, Thirteenth and Fourteenth Amendments to the Federal Constitution.

### A. The Universal Military Training and Service Act as Construed and Applied to Appellant Calls for Non-Federal Labor Draft in Violation of the Thirteenth and Fourteenth Amendments.

Appellant submits that unless the Act and Regulations are construed as suggested under Point A, above, an alternative interpretation renders Section 456(j) of the Universal Military Training and Service Law unconstitutional.

While appellant may be conscripted, he cannot be compelled by Congress to work for a private employer, or even in non-federal public employment. True, many cases seem to hold that Congress may prescribe civilian employment in lieu of military service. But by and large, those cases involved work at a public service camp which were created and operated at the expense of the federal government. (*United States v. Brooks,* 54 Fed. Supp. 995; *affirmed, Brooks v. United States,* 147 F. 2d 134, *cert. den.* 324 U. S. 878; *Weightman v. United States,* 142 F. 2d 188; *Hopper v. United States,* 142 F. 2d 181; *United States ex rel. Zucker v. Osborne,* 54 Fed. Supp. 984.) Even though some of the camps may have been run by religious groups, they were nonetheless federal camps, under federal control, administered by and through federal regulations promulgated by General Hershey, Director of Selective Service. Thus, the religious organizations were mere agents of the government.

In the instant case, the national government exercises no control whatever over the activities of the Department of Public Charities.

Under the rules established in *Pollack v. Williams,* 322 U. S. 4, there can be no indirect violation of the Thirteenth Amendment; criminal sanctions cannot be imposed against those refusing to do forced labor. By analogy, the war powers cannot be utilized to compel performance of a service not of an exceptional character.[34] If the service has no direct relation to the war effort, it is not an employment which may be required of appellant, regardless of whether it be private or non-federal public.

In *United States v. Copeland,* 126 Fed. Supp. 734, the District Court for Connecticut, in passing upon the question of whether an assignment to a private employment was valid, held that it was not, and ruled the Regulations in this respect unconstitutional. The analogy here is obvious. Even though appellant was assigned to a governmental employer, the effect was no different than if the employment had been of a non-public character. In either case the federal government is going beyond the sphere of permissible federal activity, and rather infringes upon matters of strictly local concern.

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[34]As, for example, authorization of a justice of the peace to issue warrants to arrest deserting seamen, an exception which finds long established custom and practice rooted in the common law.

**B. Section 456(j) of the Universal Military Training and Service Law Requiring Appellant to Enter Civilian Employment Not of His Own Choosing in Lieu of Military Service Is an Unconstitutional Trespass Upon Appellant's Religious Liberty.**

The mandatory employment requirement is unconstitutional in that it allows liberty to those only whose conscience will permit compliance with its provisions.

In the instant case, appellant is not only opposed to military service, but cannot obey any military order however remote to militarism [see attached hereto, and marked Appendix "B," the copy of the Declaration of the Elders of the Molokan Church, the original of which was filed with the court below—see TR 13]. There can be no question of the appellant's sincerity and his good faith (see: report of hearing officer, Selective Service File, pp. 54-55). He has stood fast to his convictions fully cognizant of the implications of his position. To gain his freedom, he must purchase his conscience. For those whose price is less, this law may serve a boon. For appellant, in time of peace, it is a two-edged sword, a weapon of war.

Appellant was within his constitutional rights to refuse to submit to governmental authority when he was directed to perform an act antagonistic to his conscience and religious scruples. (Dissent of Justice Hughes, in *United States v. MacIntosh,* 283 U. S. 605, 627; *Girouard v. United States,* 328 U. S. 51.)

Yet, where Congress has provided legislative sanctuary for those opposed to military endeavor *in any form,* is it not in the furtherance of Congressional intention to accede to religious conscience in this case? Both Congress and the Courts have recognized that citizens may defend and support the Constitution in varying ways other than the bearing of arms. (*Girouard v. United States, supra.*) Appellant's position should not be construed as a challenge of governmental authority or power. We in this country have been ever mindful of the dignity and freedom of the individual. This, then is an assertion of an individual's dignity. It is a recognition of the principles of religious tolerance which have recommended this nation to the envy of the free as well as the enslaved.

## Conclusion.

For the foregoing reasons, appellant respectfully submits that the judgment of conviction of the District Court herein should be reversed in that it rests upon an invalid and an unconstitutional order.

Respectfully submitted,

A. L. Wirin,

Hugh R. Manes,

*Attorneys for Appellant.*

## APPENDIX A.

### Class III

1622.30 Class III-A: Registrant With a Child or Children; and Registrant Deferred by Reason of Extreme Hardship and Privation to Dependents.—(a) In Class III-A shall be placed any registrant who prior to *August 25, 1953,* has submitted evidence to the local board which establishes to the satisfaction of the local board that he has a child or children with whom he maintains a bona fide family relationship in their home. Such a registrant shall remain eligible for Class III-A so long as he maintains a bona fide family relationship with such child or children in their home.

(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship and privation (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith; provided, that a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.

## APPENDIX B.

To the Government of the United States--The Department of Justice.

THE FIRST AMENDMENT TO THE BILL OF RIGHTS.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of people peaceably to assemble and to petition the Government for a redrewv of grievances.

The Holy Spirit has been the Guiding Force for the Molokan Spiritual Christian Holy Jumpers ever since through the gracious mercy of our Lord Christ, they received, accepted, and inherited in 1830 what Jesus said in St. John Chapter 15 Verse 26, "But the Comforter which is the Holy Ghost whom the Father will send in my name, he shall teach you all things to your remembrance (*sic*) whatsoever I have said unto you." We are followers of the prophets and followers of the dictate of the Holy Spirit in each man as it moves him. Our religion is a faith led by the Holy Spirit, powered by the Holy Spirit, and counselled by the Holy Spirit.

In the Old World our forefathers went through unbelievable (*sic*) persecutions for fullfilling the dictate of the Holy Spirit. We have authentic book of prophecy, (*sic*) "Spirit and Life" in which are all the detailed struggles of our leaders led by the Holy Spirit.

We are Spiritual followers of Christ and have authentic proof to the Government the Gift of the Holy Spirit and

why it is imparative (*sic*) for us that you accept our redress for grievances because of the persecution of our young men for following the dictate of the Holy Spirit against 1-0 Service. We are much concerned as to how the Government—Department of Justice—will interpret the laws today and in the future; we are alarmed and cannot withold (*sic*) our anxiety over their position. We wish to humbly present to you happenings in the base and in case of this young man at the present by Judge James M. Carter for a term of four years. We are presenting the young men of the First War; how they were treated regarding their stand by the dictation of the Holy Spirit. From the book, The Conscientious Objector in America, by Norman Thomas, published in 1923 and with introduction by Robert M. La Follette of Wisconsin: pages 50 to 54; 149 to 155; and 189 to 194. We had young men from 1942 to 1946 who through the same Holy Spirit were prosecuted for refusing 4 E Camp Service. Their sentences ranged from six months to two years during the war time and one was before Judge Yankwich who gave him probation.

Now concerning the young man Nick Allen Klubnikin. In his testimony before Judge Carter he said that according to the dictate of the Holy Spirit he cannot accept the 1-0 Service and abide by the order of the Draft Act to perform in leiu (*sic*) of military service. The young man was in full consideration of the seemingly advantageous offer in leiu (*sic*) of military service: his call of the Holy Spirit was one he couldn't deny. Even when Judge

Carter asked if he wanted to appeal his case to a higher court, his answer was negative and the four year sentence did not deter him from his convictions of his faith, to fullfill the dictate of the Holy Spirit. The Church came to his aid to take up the plea to the higher court for justice in this great Promised Land, that God Blessed for religious peoples who had enough persecutions in the Old World.

The Holy Spirit has guided us by prophecy into this Refuge for His people and all those fortunate to be here. The Holy Spirit has proved to us that we must abide to His dictation because there is no Power of knowledge greater than His. Those of our Sect who didn't follow the Holy Spirit were left in the Old World; to meet the fate of famine, hardship, persecutions, extinction, and cruel death of what the Holy Spirit prophesied. The Hold Spirit is not only our religion but the very foundation of our religion. The Father, the Son, and the Holy Spirit are as one. Therefore when we follow the Holy Spirit as He dictates to us we follow the Will of our God, the Lord, Jesus Christ. The Holy Spirit has the esteemed loft in being of importance to the followers of Christ; even higher than the Ten Commandments. If a man breaks a Commendment, upon confession, he is forgiven through the mercy of Christ but regarding the Holy Spirit Christ reminds us in Mathews Chapter 12 Verse 32 "And whosoever speaketh a word against the Son of man, it shall be forgiven; but whosoever speaketh against the Holy Spirit, it shall not be forgiven him, neither in this world, neither in the world to come.

Therefore we, as Elders of the Church, petition for the freedom of the Holy Spirit—Freedom of Religion—and petition for redress of the grievances which we have presented to you concerning our young man. Therefore we plead for justice for this young man, Nick Allen Klubnikin. We ask you to consider the futility of imprisonment and the danger of democracy of persecuting religious belief led by the Holy Spirit.

Sincerely on this day of our Lord, Dec. 30, 1954.

/s/ John W. Susoff Minister
/s/ John Klubnikin
/s/ G. W. Klubnikin
/s/ Alexander Lukianov
/s/ Philip A. Shubin
/s/ Andrew F. Shubin

On Jan. 3, 1955, I, the hereby undersigned swear and testify that I witnessed the above signatures.

/s/ William A. Shubin
William A. Shubin